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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, A. D. 1941.

**EXHIBIT SUPPLY COMPANY,**  
*Petitioner,*

vs.

**ACE PATENTS CORPORATION,**  
*Respondent.*

No. 154.

**GENCO, INC.,**

*Petitioner,*

vs.

**ACE PATENTS CORPORATION,**  
*Respondent.*

No. 155.

**CHICAGO COIN MACHINE COMPANY,**  
*Petitioner,*

vs.

**ACE PATENTS CORPORATION,**  
*Respondent.*

No. 156.

**BRIEF FOR RESPONDENT.**

**CASPER W. OOMS,**

*Attorney for Respondent.*

**JOHN A. RUSSELL,**

*Of Counsel.*



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<b>EXHIBIT SUPPLY COMPANY,</b> <i>Petitioner,</i>	}	<b>No. 154.</b>
<i>vs.</i> <b>ACE PATENTS CORPORATION,</b> <i>Respondent.</i>		
<hr/> <b>GENCO, INC.,</b> <i>Petitioner,</i>	}	<b>No. 155.</b>
<i>vs.</i> <b>ACE PATENTS CORPORATION,</b> <i>Respondent.</i>		
<hr/> <b>CHICAGO COIN MACHINE COMPANY,</b> <i>Petitioner,</i>	}	<b>No. 156.</b>
<i>vs.</i> <b>ACE PATENTS CORPORATION,</b> <i>Respondent.</i>		

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**BRIEF FOR RESPONDENT.**

*To the Honorable the Chief Justice of the United States  
and the Associate Justices of the Supreme Court of the  
United States:*

The three suits here on Writs of Certiorari present only two questions argued by Petitioners: (1) The desirability of the doctrine of mechanical equivalents in the patent law. (2) A question of file wrapper estoppel.

The other question argued by Petitioners relates to asserted intervening rights of Petitioners which are without support in the Record.

## A STATEMENT OF THE CASE. .

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### **The Patented Device.**

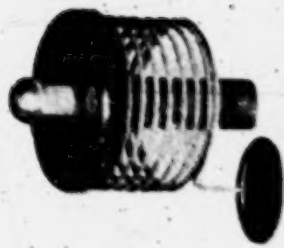
The subject matter of the patent in suit is a target for a pin table which could be struck from any direction whatsoever, which formed a resilient self-restoring switch without crevices and pivots for the collection of dirt, could be easily mounted as a unit on the upper surface of a pin table where it could be instantly seen whether the device was in or out of adjustment, and where adjustment could be readily effected merely by twisting the device upon its standard. The device and the place of the invention in its art are succinctly stated by the Circuit Court of Appeals. (R. 670-672; 119 F. (2d) 349, 350.)

The statements of the Circuit Court of Appeals with respect to the immediate and considerable commercial success of the patented device (R. 675) and the presence of invention in the patented structure over the voluminous prior art (R. 672-675) are not here in issue. Both reflect specific findings by the District Court upon the controverted questions. (R. 494-495, Findings 22-26.)

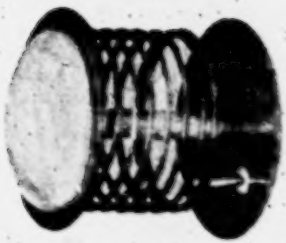
Inasmuch as the issue of equivalency, necessarily involving the functions of the patented structure, is before the Court, this brief statement by the District Court of the advantages resident in the patented structure is pertinent:

"11. The advantages of the device invented by Nelson lie in the fact that this simple structure forms both a target and a switch, a target which is accessible from any direction and so resilient that the ball which strikes it rebounds and thus increases the activity on the board, that a ball striking it is not disabled and may continue in its course about and down the board to strike similar targets about the board, that the device is extremely simple and requires no skill to install,

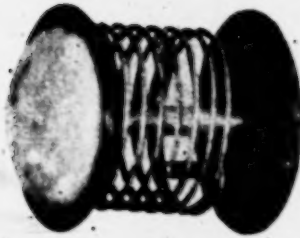




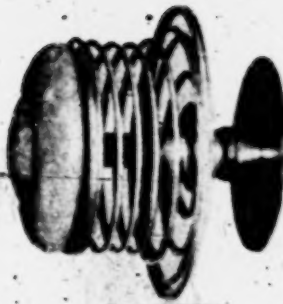
Patented Device  
Plaintiff's Exh. 11



Plaintiff's  
Exhibit 5



Plaintiff's  
Exhibit 6



Plaintiff's  
Exhibit 8

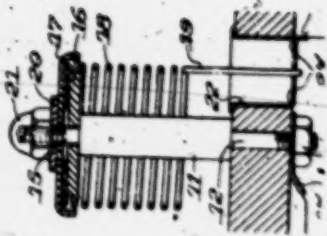
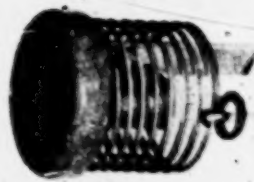
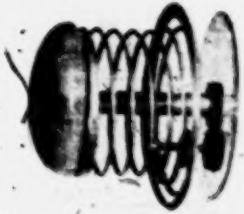


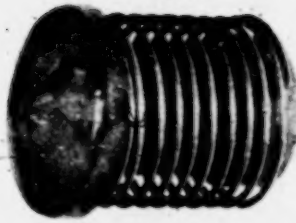
Fig. 2 of Nelson  
Patent (R. 548)



Plaintiff's  
Exhibit 7



Plaintiff's  
Exhibit 10



Plaintiff's  
Exhibit 9

# PLATE I

Photographs of Nelson Patented Device (Pl. Exh. 11) and  
the Six Infringing Devices



that the device has no pivots or crevices into which dirt might enter to disable it, that the device can be adjusted merely by rotating the spring about the standard upon which it is centrally mounted, and that if the device does go out of adjustment, this can be immediately detected by superficial examination of the playing board surface without the removal of any portions of the game cabinet." (Finding 11, R. 490-491.)

### **The Infringing Devices.**

Six accused devices were before the District Court. The District Court and the unanimous Circuit Court of Appeals held each of the six to infringe the single claim 4 of the Nelson patent in suit, No. 2,109,678 issued March 1, 1938.

Photographs of the six infringing devices (Pl. Exh. 5, 6, 7, 8, 9 and 10), of Fig. 2 of the Nelson patent drawing (R. 548), and of the commercial form of the patented device (Pl. Exh. 11) are here reproduced. The patented structure which realized the commercial success found by the lower courts was identical with the form shown in the patent drawing. (R. 85-86.)

Each of the illustrated devices is a pin table target switch formed of a coil spring pendantly supported above the pin table upon a stationary standard, with a portion of the coil spring designed to strike a complementary conductor embedded in the table when the coil spring is struck at any point by a rolling ball to close an electrical circuit in which the coil spring is one of the conductors. The seven devices differ only in the specific form and method of supporting the complementary conductor, and the single question before this Court is whether the claim in suit is avoided by this formal alteration of the structure.



The contention of non-infringement in this case is based upon the fact that in two of the infringing devices, Pl. Exh. 5 and 7, Petitioners have substituted for the ferrule mounted in the pin table board a nail or pin which is embedded in the board, and have formed a ring or ferrule at the end of the resilient coil spring to surround the pin. This is a simple reversal. Response to the claim is evident. (See Plate III at page 14 herein.)

As to the next class of infringing devices, typified by Pl. Exh. 6, and 10, Petitioners have made the additional alteration that instead of embedding the pin directly in the pin table board, they have added to the board another lamination, which is rigidly anchored and attached to the board by means of the coil spring standard, and have embedded the pin in this upper lamination of the pin table board. This involved merely the addition of a completely passive element which became a part of the board. The attempted evasion is purely a literary device and a most transparent effort to retain all of the structural and functional characteristics of Nelson with a verbal distinction to fall back upon in case of attack. (See Plate IV at page 22 herein.)

In the last two devices to be considered, Pl. Exh. 8 and 9, the upper lamination of the pin table board has been removed and substituted therefor is an insulating core, which spaces the conductor from the resilient coil standard, and is anchored to the standard, which is embedded in the board, so that functionally the conductor member itself is embedded in the board. (See Plate V at page 24 herein.)

These three classes of infringing devices will be discussed in turn, and the question of file wrapper estoppel, upon which Petitioners based their prayer for the writs granted herein, will be treated in connection with the last two devices, the only devices to which any consideration of that question is pertinent.

Preliminary to a consideration of the several devices separately their structural and functional identity can be readily seen by an examination of the chart, Plate II, attached to the back cover of this brief, upon which the progressive modifications accomplished by Petitioners are illustrated by using parts of approximately the same size and proportion in order to facilitate comparison. Examination of the chart discloses that all Petitioners have done in shifting from one structure to the other is to shift the location of the conductor from a position in which it is obviously and unquestionably embedded in the table to a position in which it is embedded in the table by the device of anchoring it either to an additional passive lamination added to the table or the coil spring standard which is embedded in the table.

**There Is No Evidence in This Record of the "Intervening Device" Repeatedly Referred to by Petitioners, Nor of the Other Facts Asserted by Petitioners of Alleged Intervening Rights.**

In support of the argument that Respondent is estopped to read the claim in suit upon the infringing structures, Petitioners assert repeatedly that a device exemplified by Pl. Exh. 5 (one of the infringing structures) was "publicly marketed and advertised" by one of the Petitioners during the prosecution of the Nelson patent application. (Pet. Br. p. 3.)

**This assertion has no foundation in the Record.**

Petitioners base their assertion upon a photostatic reproduction (Pl. Exh. 23, R. 357) of an advertisement published by one of them in The Billboard magazine of February 27, 1937. This advertisement, with others, was offered to show that immediately upon the first public sale of pin tables equipped with the Nelson invention by Respondent's licensee in December, 1936, the entire industry

began not only to use this device, but also to feature it in extensive advertising, a singular tribute to this modest device. Not one of these advertisements illustrates any of the infringing forms now before this Court. Each advertisement which pictures the bumper spring target switch shows only the form shown in the Nelson patent (R. 353, 357, 361), that is, with the wire forming the coil spring extended into a pendant leg, or as the patent describes it, "a coil spring 18, which at its lower end terminates in a pendant spring leg 19." (R. 549, col. 2, ll. 20-21.)

It is exactly that form of device shown in the patent drawing (R. 548) that is pictured in the advertisement (R. 357) of Petitioner, Chicago Coin Machine Co. The only difference between the "Bumper Spring" shown in the advertisement and that shown in the Nelson patent drawing is in the bend where the coil spring joins the pendant leg, shown by Nelson as a right-angled bend and in the advertisement as a curved bend.

There is not one word of testimony in this record of any "intervening device" marketed during the prosecution of the Nelson patent application which differs in any other detail from the specific structure shown in the Nelson patent application.

Petitioners also say, "No claim of Nelson's application, as filed, covered the intervening device." (Pet. Br. p. 3.) **This is not true.** Assuming that the "intervening device", which exists only in Petitioners' insistent repetition of the assertion not supported by the record, was like Pl. Exh. 5, that device responded to Nelson's original claim 2, which reads:

"2. In a ball rolling game, a table, the combination with said table of a support thereon carrying a pendant coil spring including an extension, said spring constituting one conductor member of a switch disposed in an electric circuit, the other member of the switch comprising a conductor carried by the table and

adapted to be engaged by said extension, said members being normally gapped apart to hold the circuit open but adapted to close momentarily to establish the circuit when a ball bumps the spring." (R. 437-438.)

Petitioners also say, "Although the Patent Office had no way of knowing that Petitioners' intervening device had inspired this afterthought. \* \* \*" etc. (Pet. Br. p. 18.) This statement lacks any support whatever in the record: (1) There is no evidence of any intervening device different from the specific form shown in the Nelson patent drawing; (2) there is no evidence of what prompted Nelson to describe the alternative form of his invention which is referred to.

Thus, Petitioners' Point II is based upon a synthetic controversy which does not arise upon the Record before this Court.

## ARGUMENT:

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### Point I.

**The Doctrine of Mechanical Equivalents Is a Necessary Doctrine of Patent Law Which This Court Has, Without Difficulty, Applied for More Than Eighty Years.**

The question before this Court is not, as Petitioners state, "whether the scope of a patent is limited by the terms of its claims, or may be enlarged therebeyond by the so-called doctrine of mechanical equivalents," but is whether the claims of a patent may be evaded by the literary subterfuge of incorporating each element of a patented device in a structure with a formal variant of one element which may not precisely respond to the terminology of the patent claim if construed in the narrowest sense, but nevertheless accomplishes the same result with substantially the same means in substantially the same manner.

The doctrine of mechanical equivalents is an old one. In 1853, this Court, in *Winans v. Denmead*, 56 U. S. 330, returned for determination by a jury the question of whether a claim for a coal car with a body

"in the form of a frustrum of a cone, substantially as herein described, whereby the force exerted by the weight of the load presses equally in all directions, and does not change the form thereof, so that every part resists its equal proportion, and by which, also, the lower part is so reduced as to pass down within the truck frame and between the axles, to lower the center of gravity of the load without diminishing the capacity of the car as described."

was infringed by a similar car made in octagonal instead of circular form. The Court held that this was a question of what we now call equivalency, saying (pages 343-344):

"Patentees sometimes add to their claims an express declaration, to the effect that the claim extends to the



thing patented, however its form or proportions may be varied. But this is unnecessary. The law so interprets the claim without the addition of these words. The exclusive right to the thing patented is not secured, if the public are at liberty to make substantial copies of it, varying its form or proportions. And therefore, the patentee, having described his invention, and shown its principles, and claimed it in that form which most perfectly embodies it, is, in contemplation of law, deemed to claim every form in which his invention may be copied, unless he manifests an intention to disclaim some of those forms.

"Indeed, it is difficult to perceive how any other rule could be applied, practicably, to cases like this. How is a question of the infringement of this patent to be tried? It may safely be assumed, that neither the patentee nor any other constructor has made, or will make, a car exactly circular. In practice, deviations from a true circle will always occur. How near to a circle, then must a car be, in order to infringe? May it be slightly elliptical, or otherwise depart from a true circle, and if so, how far?

"In our judgment, the only answer that can be given to these questions is, that it must be so near to a true circle as substantially to embody the patentee's mode of operation, and thereby attain the same kind of result as was reached by his invention. It is not necessary that the defendant's cars should employ the plaintiff's invention to as good advantage as he employed it or that the result should be precisely the same in degree. It must be the same in kind, and effected by the employment of his mode of operation in substance. Whether, in point of fact, the defendant's cars did copy the plaintiff's invention, in the sense above explained, is a question for the jury, and the court below erred in not leaving that question to them upon the evidence in the case, which tended to prove the affirmative."

Petitioners prayer for abolition of the doctrine of equivalents joined with the concession that the doctrine "may have a proper place," is made without an attempted

statement of the doctrine. Once the limitations of the doctrine as announced by this Court are recognized any difficulty in its application disappears.

Even so simple a statement as was made by this Court in the early case of *Goodyear Dental Vulcanite Co. v. Davis*, 102 U. S. 222, where the Court held celluloid and vulcanized rubber not to be equivalents in the patented process for the manufacture of dental plates there considered, would answer most of the questions arising under the doctrine. The Court there said (page 230):

"This construction of the patent is confirmed by the avowed understanding of the patentee, expressed by him, or on his behalf, when his application for the original patent was pending. We do not mean to be understood as asserting that any correspondence between the applicant for a patent and the Commissioner of Patents can be allowed to enlarge, diminish or vary the language of a patent afterwards issued. Undoubtedly, a patent, like any other written instrument, is to be interpreted by its own terms. But when a patent bears on its face a particular construction, inasmuch as the specification and claim are in the words of the patentee, it is reasonable to hold that such a construction may be confirmed by what the patentee said when he was making his application. The understanding of a party to a contract has always been regarded as of some importance in its interpretation."\*

Since the decision in *Winans v. Denmead*, 56 U. S. 330, the principle there announced has been reaffirmed in numerous opinions of this Court:

*Sewall v. Jones*, 91 U. S. 171.

*Ives v. Hamilton*, 92 U. S. 426.

*Machine Co. v. Murphy*, 97 U. S. 120, 125.

*Imhaeuser v. Buerk*, 101 U. S. 647.

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\* The contractual character of the patent grant is recognized in this opinion. The quoted passage with respect to the correspondence passing between the applicant and the Patent Office is peculiarly pertinent to this case, where the applicant anticipated and described one of the forms of his invention which Petitioners adopted in their effort to evade literal response to the patent claim.

- Duff v. Sterling Pump Co.*, 107 U. S. 636, 639.  
*Rowell v. Lindsay*, 113 U. S. 97.  
*Morley Sewing Machine Co. v. Lancaster*, 129 U. S. 263, 273.  
*Hoyt v. Horne*, 145 U. S. 302.  
*Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 207.  
*Deering v. Winona Harvester Works*, 155 U. S. 286.  
*Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 575.  
*Hobbs v. Beach*, 180 U. S. 383, 399.  
*Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405, 414-415.  
*Abercrombie & Fitch Co. v. Baldwin*, 245 U. S. 198, 207.  
*Hildreth v. Mastoras*, 257 U. S. 27, 36.  
*Eibel Process Co. v. Minnesota & Ontario Paper Co.*, 261 U. S. 45, 63.  
*Sanitary Refrigerator Co. v. Winters*, 280 U. S. 30, 41-42.  
*Smith v. Snow*, 294 U. S. 1, 14-20.

The doctrine of equivalents is clear. No court has experienced any greater difficulty in its application than arises in the application of any legal doctrine. It requires no clarification.

There is reason for the doctrine of mechanical equivalents. The statute (Title 35, U. S. Code, Section 33) requires that a patentee who has invented a machine shall:

"Explain the principle thereof, and the *best mode* in which he has contemplated applying that principle, so as to distinguish it from other inventions; and he shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery."

All that the statute requires of the inventor is that in his specification he shall set forth the *best mode* of applying the principle of his invention. It does not require him to



anticipate and disclose every conceivable mechanical variation and formal rearrangement which may be made of the parts of his machine. It requires him to point out that "which he claims as his invention." It does not require him to present a claim for every conceivable variant form in which his invention may be embodied without affecting the principle of its structure and operation.

It is obviously impossible for an inventor to anticipate and make a claim for every alternative form in which his invention may be incorporated. The mere physical labor in the Patent Office imposed by any such doctrine would preclude it as a practical method of administration of the patent laws. The Patent Office has long asserted as a ground of rejection the undue multiplicity of claims.

These considerations make evident why the doctrine of mechanical equivalents is a necessary part of the doctrines of patent interpretation. Its propriety has long been recognized by this court, and has never been better stated than in the opinion of the Chief Justice in *Smith v. Snow*, 294 U. S. 1, 11.

"We may take it that, as the statute requires, the specifications just detailed show a way of using the inventor's method, and that he conceived that particular way described was the best one. But he is not confined to that particular mode of use since the claims of the patent, not its specifications, measure the invention. . . . While the claims of a patent may incorporate the specification or drawings by reference, . . . and thus limit the patent to the form described in the specifications, it is not necessary to embrace in the claims or describe in the specifications all possible forms in which the claimed principle may be reduced to practice. It is enough that the principle claimed is exemplified by a written description of it and of the manner of using it 'in such full, clear, concise, and exact terms' as will enable one 'skilled in the art to make, contrast, compound and use the same'."

## Point II.

**The History of the Prosecution of the Nelson Application Discloses That Only One of the Several Limitations Asserted by Petitioners as Having Been Demanded by the Examiner was Made, and the Record Contains No Evidence of the Intervening Rights Asserted.**

Petitioners base their argument of non-infringement on two grounds:

(1) That several limitations of the claim in suit were entered by Nelson during the prosecution of his application, and

(2) That "not until after one of Petitioners had marketed the Exhibit 5 device did Nelson attempt to enlarge the monopoly sought." (Pet. Br., p. 14.)

Petitioners' argument that there is no infringement because of alleged limitations written into the claim, opens with a statement which completely distorts what occurred in the prosecution of the Nelson application. They say:

"Notwithstanding the prior Fisher patent (R. 552) and the Bolo device (R. 469), and notwithstanding that the claim in suit was allowed only after the Examiner had required that, in order to distinguish over the prior art:

"\* \* \* the applicant's particular type of contact structure, comprising an extension on the coil spring adapted to engage an annular contact embedded in the table, must appear in the claims" (R. 449-450).

the courts below proceeded to hold infringement by devices which (like the prior art) had neither the **extension on the coil spring** nor the **annular** contact embedded in the table. The patent could not, at once, be both valid and infringed." (Emphasis added.) (Pet. Br., p. 7.)

As a matter of fact, Nelson never acceded to what Petitioners say "the Examiner had required." He never

adopted the limitations indicated in the words printed in bold face or anything similar thereto. What actually occurred is set forth in detail in the next section of this brief.

Petitioners' reiteration that Pl. Exh. 5 or a form of the Nelson invention exemplified thereby was on the market during the prosecution of the Nelson application is wholly unsupported by the Record. The facts are discussed in the final section of this Argument.

**The Nelson Claim Reads Directly and Literally on Plaintiff's Exhibits 5 and 7, as Is Manifest Upon Inspection of Plate III.**

In Reply Brief for Petitioners filed in answer to Brief in Opposition to Petition for Writs of Certiorari herein, Petitioners said (page 2):

"3. A point of fact which was determined by the court below and which we do not controvert here is that the claim in suit, when construed by dictionary, does read literally upon the accused devices, Exhibits 5 and 7."

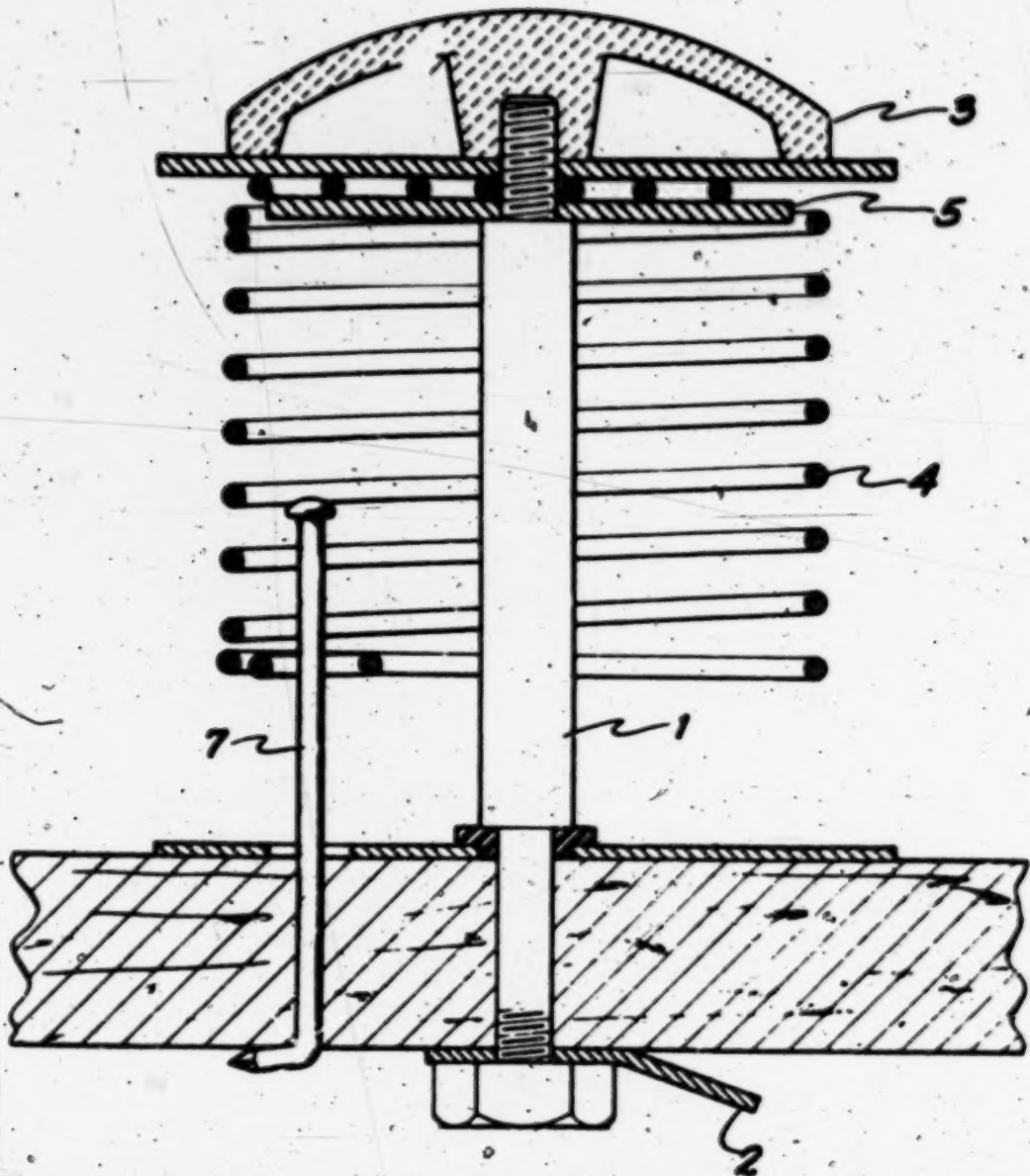
In Pl. Exh. 5 and 7 the Nelson structure is carefully copied except for a simple reversal of the form of the contact members by which the circuit is closed.

The Nelson patent shows the coil spring terminating in a pendant leg which moves within a complementary conductor in the form of a brass ring embedded in the board. Petitioners' structures, Pl. Exh. 5 and 7 show the coil spring terminating in a small ring which moves about a pin embedded in the board.

The possibility of this simple reversal to effect a formal evasion of the claim was anticipated by Nelson during the prosecution of his application before the Patent Office. In one of his communications to the Patent Office Nelson made this reply:

"Considering the art cited, it is too far to go to state that the specific leg 19 must be defined. Each of the





CHICAGO COIN MACH. CO. A  
DEFENDANT'S EXH C1  
PLAINTIFF'S EXH. 5

Claim 4

In a ball rolling game having a substantially horizontal table over which balls are rollable, the combination with said table of

- (1) a substantially vertical standard anchored in said table with its lower end carrying on the underside of the table
- (2) a lead for an electric circuit and
- (3) its upper end extending a substantial distance above the top surface of the table,
- (4) a coil spring surrounding the standard,
- (5) means carrying said spring pendantly from the upper portion of the standard above the table with the coils of the spring spaced from the standard to enable the spring to be resiliently flexed when bumped by a ball rolling on the table,
- (6) said spring being in the aforementioned circuit and constituting a conductor, and
- (7) conductor means in said circuit and embedded in the table at a point spaced from the standard and engageable by a portion of the spring when it is flexed to close the aforementioned circuit.

***PLATE-III***

***THE NELSON CLAIM READS DIRECTLY AND LITERALLY ON PLAINTIFF'S EXHIBITS 5 AND 7***



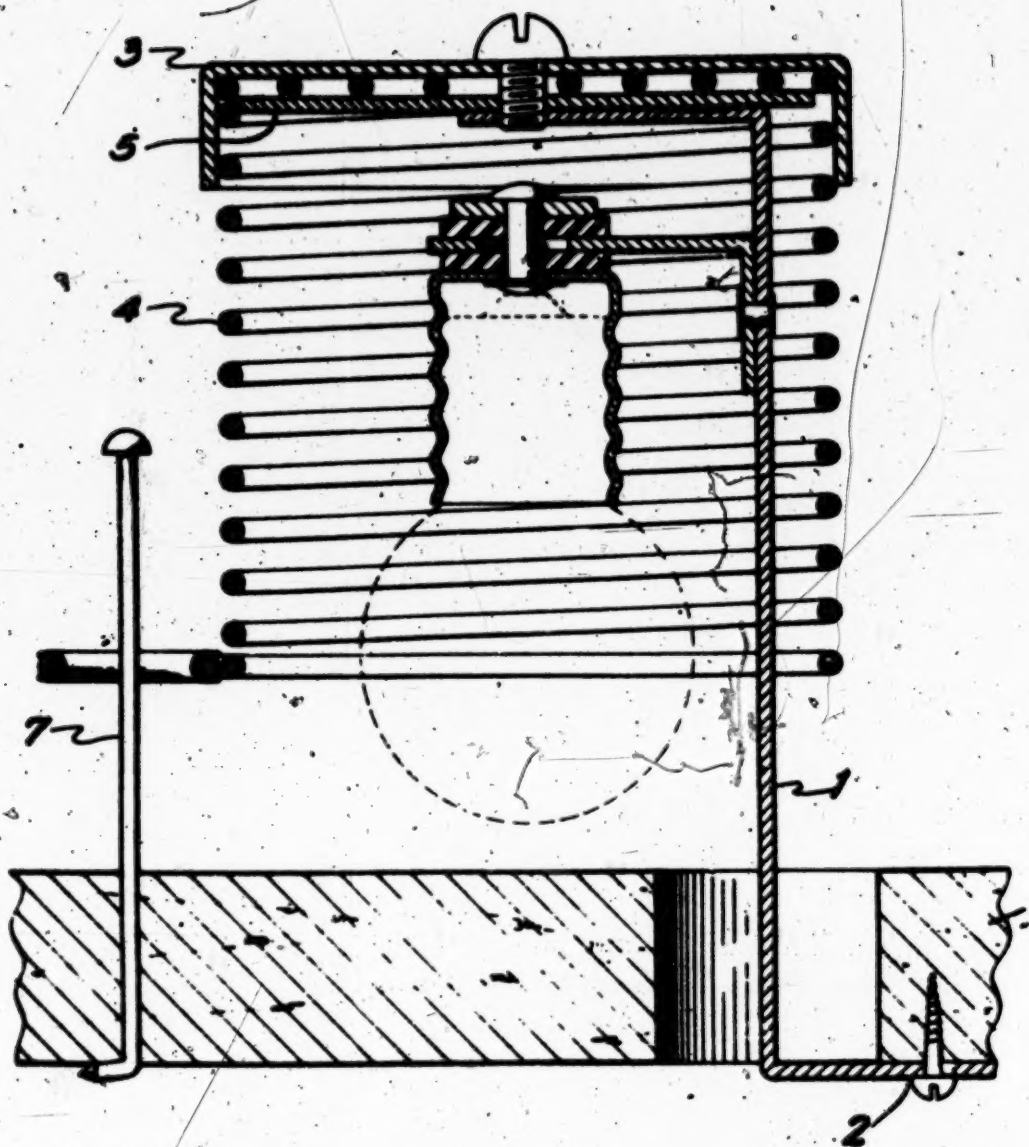
Claim 4

In a ball rolling game having a substantially horizontal table over which balls are rollable, the combination with said table of

- (1) a substantially vertical standard anchored in said table with its lower end carrying on the underside of the table
- (2) a lead for an electric circuit and
- (3) its upper end extending a substantial distance above the top surface of the table,
- (4) a coil spring surrounding the standard,
- (5) means carrying said spring pendantsly from the upper portion of the standard above the table with the coils of the spring spaced from the standard to enable the spring to be resiliently flexed when bumped by a ball rolling on the table,
- (6) said spring being in the aforementioned circuit and constituting a conductor, and
- (7) conductor means in said circuit and embedded in the table at a point spaced from the standard and engageable by a portion of the spring when it is flexed to close the aforementioned circuit.

***PLATE-III***

***THE NELSON CLAIM READS DIRECTLY AND LITERALLY ON PLAINTIFF'S EXHIBITS 5 AND 7***



**EXHIBIT SUPPLY CO. A**  
**DEFENDANT'S EXH. E1**  
**PLAINTIFF'S EXH. 7**





allowed claims can, it seems, be very simply avoided by taking the leg 19, separating it from the spring 18 and embedding it as a pin in the table so that the spring when flexed would contact the pin. In view of this it is very difficult to understand why a claim covering such a simple change, which is well within the scope of applicant's invention, should not be allowed. Claim 7 covers such alternative form and should be allowed as the art is not pertinent to the organization defined." (R. 450-451.)

Although previously (R. 449) the Examiner had demanded that

"In order to distinguish over the references thereof, the applicant's particular type of contact structure, comprising **an extension on the coil spring** adapted to engage an **annular** contact embedded in the table, must appear in the claims. Such structure is absent from the above rejected claims 2 and 7." (Bold not in original.) (R. 449.)

Nelson refused to accede to this demand. He never acceded to the demand. He ignored each of the specific restrictions suggested by the Examiner and indicated by the emphasized portions of the foregoing passage.

Nelson not only resisted this demand but told the Examiner that to accede to it would offer an opportunity for evasion of the claim by " \* \* \* taking the leg 19, separating it from the spring 18 and embedding it as a pin in the table. \* \* \* " (R. 450-451.)

The Examiner did not repeat the demand. He called attention to the fact that the claim, in describing the coil spring spaced from the standard "**and the lower end of the coil spring terminating at a distance above the top surface of the table,**" was inoperative "as the coil spring could not terminate at a distance above the table and extend into a ferrule embedded therein." (R. 452.)

The Examiner was evidently thinking merely of the specific preferred form of the Nelson invention shown in the patent drawing and described in the specification. In that form the **body of the coil spring** does terminate at a distance above the top surface of the table, but the wire from which the coil spring is formed is continued to form the **"extension on the coil spring,"** (which the Examiner had demanded be specified in the claim and which Nelson had refused to specify), which does extend to the complementary conductor embedded in the board. That this was the Examiner's thought is apparent from the fact that he then complained that the alternative form mentioned by Nelson (R. 451) with the pin embedded in the table, was not shown in the drawing or specification. This complaint was groundless. The statute (Title 35, U. S. Code, § 33) requires the inventor of a machine to "explain the principle thereof and the *best mode* in which he has contemplated" applying the principle of his invention. This Court has succinctly stated the doctrine applicable in the passage from the opinion in *Smith v. Snow*, 294 U. S. 1, 11, quoted on page 13 of this Brief.

Whatever the merits of the Examiner's complaint, Nelson again refused compliance. He would not limit his claim to the specific form shown in the drawing. Instead of acceding to the Examiner in making the claim more specific, to clarify the reading of the claim, he struck the limitation complained of,

"and the lower end of the coil spring terminating at a distance above the top surface of the table"

from the claim and substituted the more general provision that the coil spring be carried from the upper portion of the standard

"above the table." (R. 453.)

In making this alteration in the claim Nelson frankly

told the Examiner that he was eliminating a limitation. He said:

"Counsel appreciates the Examiner's view respecting claims 7 and 8 and therefore the limitation to the coil spring having its lower end terminate above the table has been eliminated." (R. 453.)

The claim now contained no limitation as to where the coil spring or any part thereof might terminate. It might terminate anywhere with relation to the table. It had to be carried by the standard above the table.

There was thus no limitation sought in the claim during its prosecution with respect to the location of the terminus of the coil spring.

The only limitation wrought in the claim during its prosecution was the change with respect to the complementary conductor (in Nelson the brass ferrule embedded in the board and projecting slightly from it, and in Pl. Exh. 5 and 7 the pins embedded in the board and projecting substantially above the board to meet the coil spring). This had originally been described as

"other conductor means carried by the table at a point spaced from the standard \* \* \*." (R. 445-446.)

Nelson changed this language in the first amendment of the claim to read

"conductor means *in said circuit and embedded in the table at a point spaced from the standard \* \* \**" (Italics indicate new terminology.) (R. 445-446.)

It was at the time Nelson introduced this limitation that he refused to accede to the Examiner's demand for other limitations, such as specifically describing the "extension on the coil spring" and specifically designating the complementary conduct as "annular." (R. 449.) In submitting this amendment Nelson described the alternative form of his invention which he anticipated could be employed

"by taking the leg 19, separating it from the spring 18

and embedding it as a pin in the table. \* \* \* (R. 450-451.)

The words "carried by" are far more comprehensive than the substituted language, "embedded in," but the concept of the conductor carried by the table in any manner whatsoever is also extremely broad. These coil springs are mounted at intervals upon a pin table and the claim in its original form would have read upon a structure in which the conductor might have been in the form of a large spider mounted upon the table with arms extending to form companion contacts to several coil springs. Almost any form of conductor which was mounted in any place or manner, permanently or movably, upon the table would have answered the language of the claim.

When the terminology of the claim was changed by means of the substitution of the words "embedded in" the terms accurately covered the preferred embodiment of the structure shown in the drawing. The terms met the dictionary definition that the conductor was "fixed firmly in a surrounding mass of some solid material." (The Oxford English Dictionary.) It was important that the conductor be fixed firmly in a surrounding mass of some solid material in order that the fixed relationship between that conductor and the coil spring would be insured. Vertical position of the conductor was unimportant except that it had to be within reach of the terminal of the coil spring so as to form a contact. The position that was important was its horizontal relation to the coil spring. The position of the coil spring was fixed by the position of the standard that was embedded in the pin table. With the conductor embedded in the table "at a point spaced from the standard" there was a fixed and unyielding relationship between the two. That was important to insure the results that Nelson anticipated for his invention and to meet the problem that he had found in the prior art.



That the vertical position of the conductor was not important except that it be within reach of the terminal of the coil spring is manifested both by Nelson's drawing (R. 548) showing his conductor protruding above the top surface of the table, and the anticipation, expressed in one of his communications to the Patent Office, of the simple reversal which is found in Pl. Exh. 5 and 7. He saw that if the pin were embedded in the table and extended upward to meet a terminal on the coil springs his structure would be present.

Petitioners have varied the elevation at which this conductor was mounted at various times, but they have never disturbed the one essential demand of the claim, that the conductor be "embedded" either directly or indirectly "in the table at a point spaced from the standard" so that the fixed relationship between that conductor and the standard which supported the coil spring would be maintained.

In Pl. Exh. 5 and 7 the pin is clearly a "conductor means in said circuit and embedded in the table at a point spaced from the standard and engageable by a portion of the spring when it is flexed to close the aforementioned circuit." The devices infringe.

### **The Cases Cited by Petitioners Are Not Pertinent to the Case Before the Court.**

Petitioners cite the two cases of *Schriber-Schroth v. Cleveland Trust Company*, 305 U. S. 47, and 311 U. S. 211. These cases involved patents in which critical changes had been made during their prosecution. As this court said in the first case (305 U. S. 47 at 49):

"The principal question for decision is whether the court below rightly sustained the validity of two patents by including in the combination constituting the alleged invention of each an element which was not in terms described in one, and the description of which

in the other was added only by amendment to the application after it was filed."

The change there involved was the alteration of a patent for a piston "by substituting by way of amendment 'webs laterally flexible' for 'extremely rigid webs' in the description of his invention." (305 U. S. 56.) The language substituted contradicted and completely excluded that formerly in the patent. The Court held that the patent could not be validly so amended.

In the second case another piston patent was involved and it was sought to construe the claims in suit to correspond in scope with previously cancelled claims, and by this construction to revive for the claim in litigation the critical element of novelty found only in the cancelled claim. This court held this could not be done under the familiar doctrine of file wrapper estoppel.

Obviously, these cases in no way conflict with the decision of the Circuit Court of Appeals in construing the terms of the patent according to their dictionary definitions, where the specification remained unchanged and the claims at all times were completely supported by the original disclosure.

Petitioners also cite the case of *Weber v. Freeman Electric Company*, 256 U. S. 668, in which during the prosecution of the patent application the applicant excluded the concept of a rotary relation between two parts of a lamp socket and in the suit upon the patent asserted his claim against a device requiring rotative movement to operate it. The file wrapper history presented a situation much like that found in *Goodyear Dental Vulcanite Co. v. Davis*, 102 U. S. 222.

**Plaintiff's Exhibits 6 and 10 Differ from Plaintiff's Exhibits 5 and 7 Only in the Fact That Petitioners Have Cut a Large Hole in the Pin Table at the Point Where the Conductor Is Normally Embedded, and Have Covered This Hole With an Additional Lamination of Material Which Is Secured to the Pin Table by the Standard, and Have Embedded the Conductors in This Top Lamination.**

As is readily apparent from an examination of the accompanying Plate IV, the second class of infringing devices also employs a pin embedded in the board and an annular termination of the coil spring surrounding the pin to form the switch. Unlike the devices previously discussed, Pl. Exh. 5 and 7, the two devices here shown include the additional modification that the pin is embedded in a plate which is in turn secured to the board in such a manner that it forms merely an upper lamination of the board. The metal plate serves no function whatsoever except to support the pin where, in the previous devices it was driven directly into the board.

Can it be seriously contended that this simple device by which the pin table is transformed from a single solid board into a structure composed of a solid board with an overlying metal lamination, avoids the terms of Nelson claim 4? The question answers itself.

The courts have uniformly, when called upon to consider the question of the separation of one unit or element of a structure into two parts which perform the same function in identically the same manner, held that infringement is not avoided by so obvious and transparent a subterfuge.

The expedient of making a structural element in laminations to effect a literal evasion of a claim is an old device that has been repeatedly rejected by the courts. In *Highway Appliances Co. v. American Concrete Expansion Joint Co.*, 93 F. (2d) 113, the claims were for an expansion joint



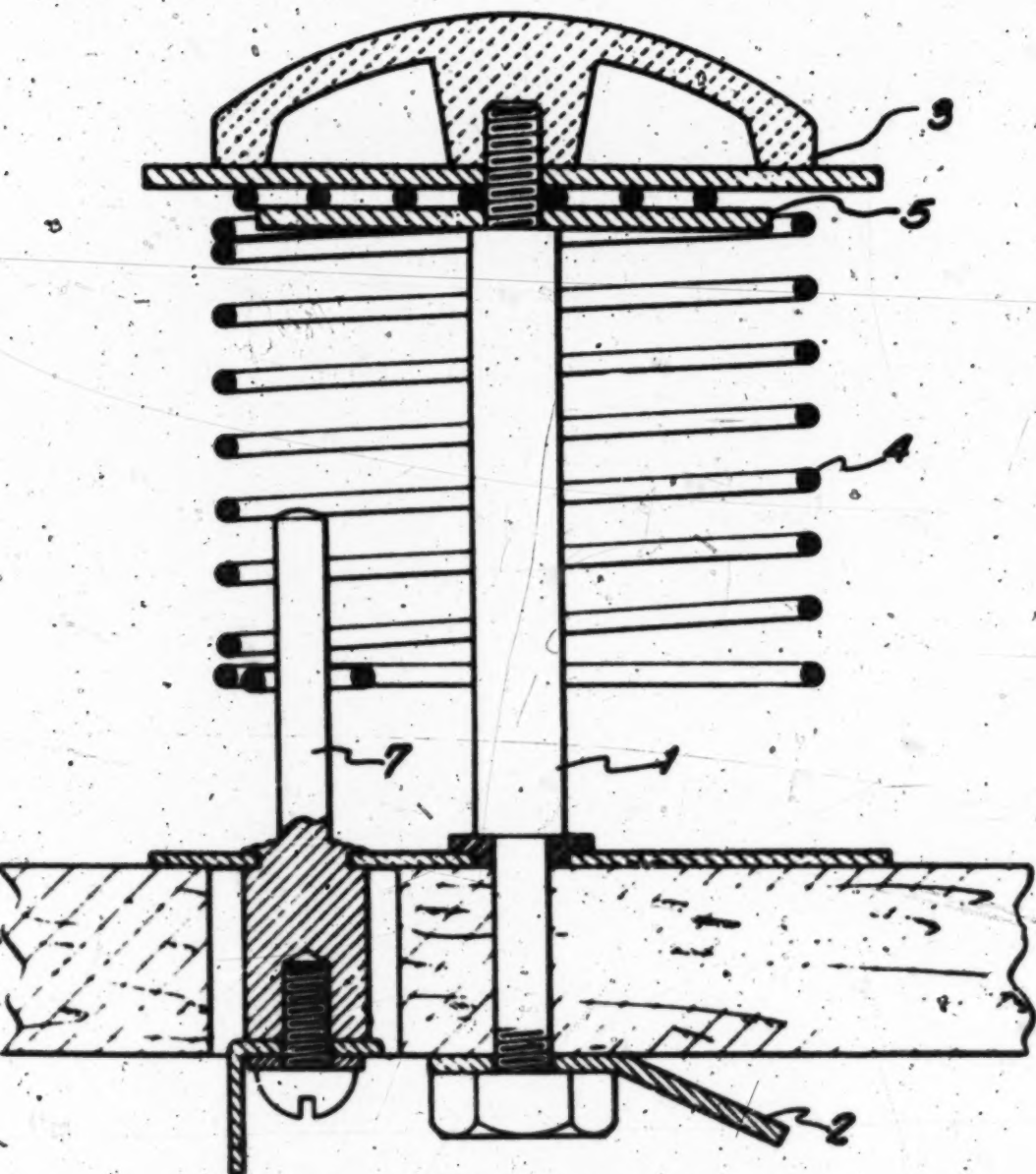
and specified among the elements "side walls." The infringing device had side walls but made these in two laminations, the outer lamination which operated in the manner of the side walls of the original patent and the inner lamination which became inactive after installation. The Seventh Circuit Court of Appeals held this to be a mere colorable departure from the terms of the claim and did not avoid infringement.

In *Line Material Co. v. Brady Electric Manufacturing Co.*, 7 F. (2d) 48, 50-51, the Second Circuit Court of Appeals said:

"Infringement is not avoided by making an element of two separate pieces, rather than a single piece, where the two separate pieces perform the same function as a single device. . . . The appellant's device has all the elements of the claim of the patent in suit. The minor changes in the form of the clevis and the plate are fully within their scope, having taken all the essential elements operating in the same way for the special purpose to accomplish the same result and infringement is clear."

That this rearrangement of the parts of Petitioners' bumper spring to embed the conductor in the added lamination of the table, instead of embedding the conductor directly in the table, does not avoid infringement is the necessary effect of the many decisions of this court dealing with the question of mechanical equivalents.





CHICAGO COIN MACH. CO. B  
DEFENDANT'S EXH. C 2  
PLAINTIFF'S EXH. 6

#### Claim 4

In a ball rolling game having a substantially horizontal table over which balls are rollable, the combination with said table of

- (1) a substantially vertical standard anchored in said table with its lower end carrying on the underside of the table
- (2) a lead for an electric circuit and
- (3) its upper end extending a substantial distance above the top surface of the table,
- (4) a coil spring surrounding the standard,
- (5) means carrying said spring pendently from the upper portion of the standard above the table with the coils of the spring spaced from the standard to enable the spring to be resiliently flexed when bumped by a ball rolling on the table,
- (6) said spring being in the aforementioned circuit and constituting a conductor, and
- (7) conductor means in said circuit and embedded in the table at a point spaced from the standard and engageable by a portion of the spring when it is flexed to close the aforementioned circuit.

### ***PLATE-IV***

***BY ADDING A PASSIVE PLATE TO THE BOARD IN PLAINTIFF'S EXHIBITS 6 AND 10 DEFENDANTS HAVE MERELY CONSTRUCTED A LAMINATED BOARD IN AN ASTUTE EFFORT TO EVADE THE LITERAL TERMS OF THE CLAIM WITHOUT IMPAIRING THE STRUCTURE OR FUNCTION OF THE NELSON INVENTION***

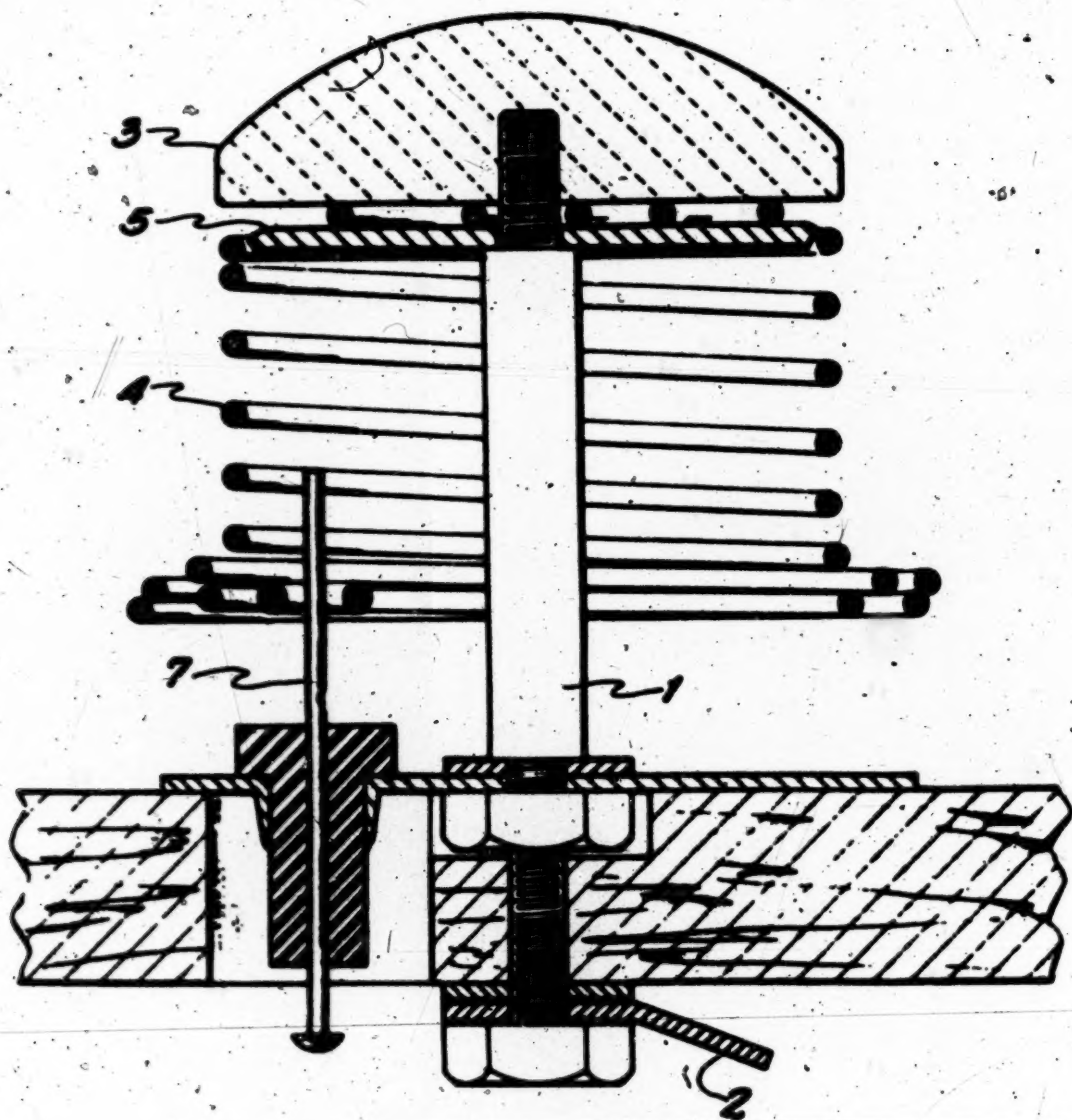
#### Claim 4

In a ball rolling game having a substantially horizontal table over which balls are rollable, the combination with said table of

- (1) a substantially vertical standard anchored in said table with its lower end carrying on the underside of the table
- (2) a lead for an electric circuit and
- (3) its upper end extending a substantial distance above the top surface of the table,
- (4) a coil spring surrounding the standard,
- (5) means carrying said spring pendantsly from the upper portion of the standard above the table with the coils of the spring spaced from the standard to enable the spring to be resiliently flexed when bumped by a ball rolling on the table,
- (6) said spring being in the aforementioned circuit and constituting a conductor, and
- (7) conductor means in said circuit and embedded in the table at a point spaced from the standard and engageable by a portion of the spring when it is flexed to close the aforementioned circuit.

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**GENCO INC.**  
**DEFENDANT'S EXH. G1**  
**PLAINTIFF'S EXH.10**





**Plaintiff's Exhibits 8 and 9 Exemplify Another Variation in the Nelson Structure, in Which, in Lieu of Embedding the Conductor Element Directly into the Pin Table or into an Added Lamination of the Pin Table, the Conductor Is Secured to a Passive Core of Plastic Material, Which Is Secured to the Standard and Thus Indirectly Embedded in the Pin Table.**

In all the structures held to infringe the Nelson patent, the coil spring standard is embedded in the pin table board. In Pl. Exh. 5 and 7, the conductor pin is separately embedded. In Pl. Exh. 6 and 10, the board is constructed with an additional lamination secured to the board and for all purposes made integral therewith by means of the embedded standard. In Pl. Exh. 8 and 9 this lamination is removed and there is substituted therefor a plastic core which, although not horizontally spread out to form a lamination of the pin table, is attached to the pin table equally securely by means of the standard, which is embedded in the board. In other words, Petitioners embed the complementary conductor in the board by the simple indirection of securing the conductor to the standard, spaced therefrom by the insulating core, and embedding the standard in the table.

Because of the variation of the proportions and dimensions of the various passive elements employed by Petitioners in the later devices, the attempted evasion is not as transparent as when the devices are represented by parts brought more nearly into proportion, as is done in the chart, Plate II, secured to the back cover of this brief.

The devices exhibited on Plate V, Pl. Exh. 8 and 9, are merely mechanical equivalents of the Nelson structure as shown in the drawings of the Nelson patent. Petitioners deny that claim 4 of the Nelson patent will reach mechanical equivalence because of a change in its terminology during the prosecution of the Nelson application.

This argument is completely answered by the section of this brief dealing with the prosecution of the Nelson application.

The equivalency of the complementary conductor found in Pl. Exh. 8 and 9 with the specific form shown in the Nelson patent drawing is at once apparent. The variant adopted by Petitioners performs every function of that specific form in the same manner as that specific form. The means employed are substantially the same.

**Petitioners' Assertion That "The File Wrapper History Shows the Attempt to Dominate the Intervening Device" Is Without Support in the Record, as There Is Absolutely No Proof of Any Intervening Device.**

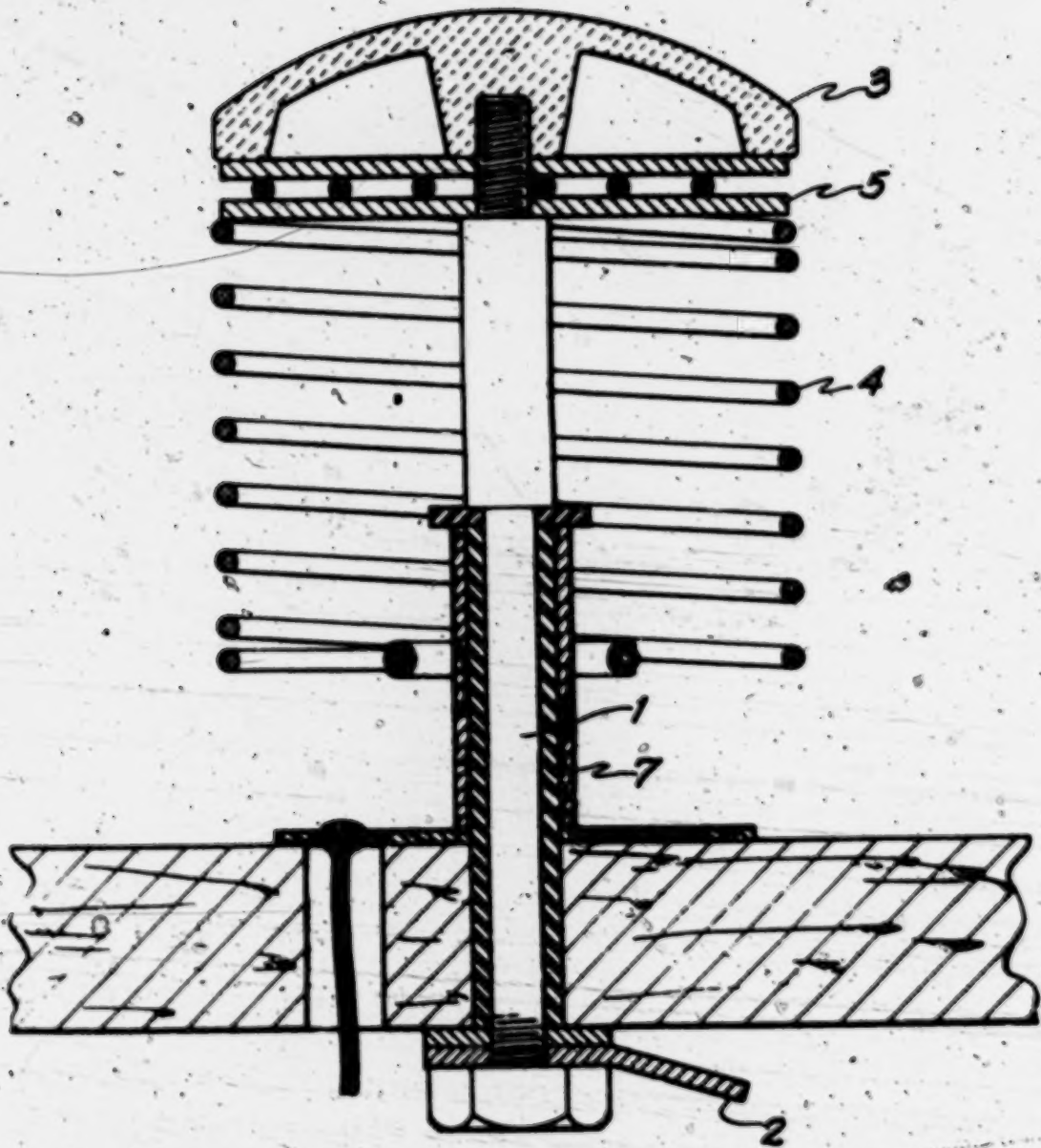
Throughout Petitioners' brief mention is repeatedly made of an alleged "intervening device." It is referred to a score of times. Petitioners say:

"On February 27, 1937 (after the Nelson application was filed), one of Petitioners publicly marketed and advertised (Exhibit 23, R. 357) a device (exemplified by Exhibit 5) of different construction from that disclosed in the application. It differs from the device disclosed in the patent in suit essentially in that the spring has no leg, and the stationary conductor is not a ferrule embedded in the table, but is a nail driven into the table. In that intervening device the lower end of the coil spring *terminated at a distance above the top surface of the table.*" (Pet. Br. p. 3.)

What is the device shown in Pl. Exhibit 23, R. 357?

The photograph is clear. It shows a "Bumper Spring" in which the wire forming the coil spring, upon completion of the lowest turn, is bent upwardly and around before descending as a pendant leg. This type of bend for a spring steel wire avoids the use of a right-angle bend, such as is shown in the Nelson patent drawing, and reduces the possibility of fracture at the bend.





**EXHIBIT SUPPLY CO. B**  
**DEFENDANT'S EXH. E2**  
**PLAINTIFF'S EXH. 8**



#### Claim 4

In a ball rolling game having a substantially horizontal table over which balls are rollable, the combination with said table of

- (1) a substantially vertical standard anchored in said table with its lower end carrying on the underside of the table
- (2) a lead for an electric circuit and
- (3) its upper end extending a substantial distance above the top surface of the table,
- (4) a coil spring surrounding the standard,
- (5) means carrying said spring pendantly from the upper portion of the standard above the table with the coils of the spring spaced from the standard to enable the spring to be resiliently flexed when bumped by a ball rolling on the table,
- (6) said spring being in the aforementioned circuit and constituting a conductor, and
- (7) conductor means in said circuit and embedded in the table at a point spaced from the standard and engageable by a portion of the spring when it is flexed to close the aforementioned circuit.

## ***PLATE-V***

***IN PLAINTIFF'S EXHIBITS 8 AND 9 DEFENDANTS HAVE MERELY ADDED A PASSIVE SLEEVE TO ENABLE THE CONDUCTOR TO BE ANCHORED TO THE STANDARD AND SO EMBEDDED IN THE BOARD***



#### Claim 4

In a ball rolling game having a substantially horizontal table over which balls are rollable, the combination with said table of

- (1) a substantially vertical standard anchored in said table with its lower end carrying on the underside of the table
- (2) a lead for an electric circuit, and
- (3) its upper end extending a substantial distance above the top surface of the table,
- (4) a coil spring surrounding the standard,
- (5) means carrying said spring pendantly from the upper portion of the standard above the table with the coils of the spring spaced from the standard to enable the spring to be resiliently flexed when bumped by a ball rolling on the table,
- (6) said spring being in the aforementioned circuit and constituting a conductor, and
- (7) conductor means in said circuit and embedded in the table at a point spaced from the standard and engageable by a portion of the spring when it is flexed to close the aforementioned circuit.

## ***PLATE-V***

***IN PLAINTIFF'S EXHIBITS 8 AND 9 DEFENDANTS  
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ENABLE THE CONDUCTOR TO BE ANCHORED TO  
THE STANDARD AND SO EMBEDDED IN THE BOARD***

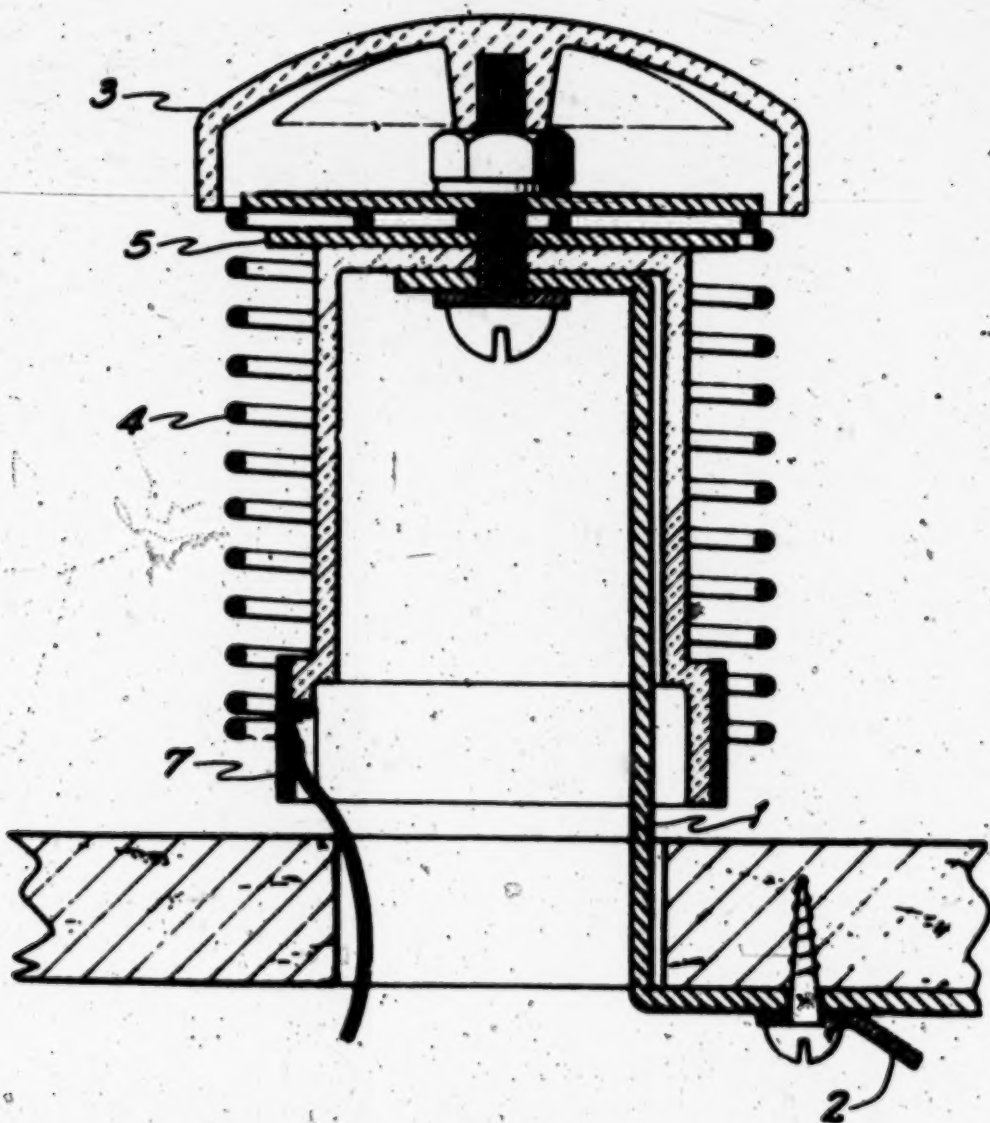


EXHIBIT SUPPLY CO. C

DEFENDANT'S EXH. E 3

PLAINTIFF'S EXH. 9



This difference in the manner in which the coil spring is bent to form the pendant leg is the only difference between the device "publicly marketed and advertised" on February 27, 1937, by one of Petitioners, and the device shown in the drawings of the Nelson patent and widely commercialized by Respondent's licensee at that time.

The photograph (Pl. Exh. 23) referred to shows nothing of the complementary conductor to be engaged by the pendant leg. (R. 357.)

Nowhere in the Record is there any testimony or other evidence of the character of this device which warrants the assertion of Petitioners that it is of the type exemplified by Pl. Exh. 5, or that "the lower end of the coil spring terminated at a distance above the top surface of the table."

The only testimony in the Record with respect to Pl. Exh. 23 is the following passage from the testimony of George D. Moloney:

"Mr. Ooms: Q. 68. I now call your attention to an advertisement appearing on page 93 of the February 27, 1937 issue of The Billboard, an advertisement bearing the name 'Chicago Coin Corp.', and ask you to point out anything that is particularly significant in that advertisement, in connection with this controversy.

"A: They also feature the Bumper spring, stating that their new game called Bump-A-Lite—I beg your pardon—the new game is 'Home Run', and they feature a cut of the Bumper spring as used on our 'Bumper' game.

"Mr. Ooms: I would like to have that advertisement appearing on page 93 of The Billboard of February 27, 1937, marked as Plaintiff's Exhibit 23.

"(Whereupon page 93 of The Billboard issue of February 27, 1937, was marked Plaintiff's Exhibit No. 23.) (R. 91.)

Another advertisement of the same machine appeared in the Billboard of March 20, 1937, reproducing the same

cut of the "Bumper Spring." It was introduced as Pl. Exh. 24 and is reproduced. (R. 361.) Of this the witness Moloney said:

"Q. 71. Will you point out the third ad in that issue that I have called attention to?

"A. 'Home Run' by Chicago Coin Corporation seems to be a duplicate of the cut that we had in other issues of The Billboard magazine picturing the Bumper spring.

"Q. 72. Does that have a separate cut of the Bumper spring?

"A. It has a separate cut of the Bumper spring." (R. 92.)

Manifestly there is nothing in this testimony that disturbs the clear showing in Pl. Exh. 23 (R. 357) that the "Bumper Spring" there shown is one with a pendant leg identical with Nelson except for the curved bend where the pendant leg joins the coil spring.

There is no question in this case arising out of intervening rights.

### Conclusion.

The writs of certiorari herein were granted upon a petition for rehearing representing that this case was substantially identical with the case of *Wuncie Gear Works, Inc. v. Outboard Marine and Manufacturing Co., et al.* No. 323 in this term. That case presents a direct issue in the record of the amendment of a patent application years after its filing to incorporate features of novelty not found in the application as filed and also after long and wide commercial use of the novel features, a true case of rights intervening during the pendency of the patent application.

This case presents only the single issue as to whether or not under the application of the doctrine of equivalents as applied by this court for more than eighty years there



is infringement of the single claim in suit. It is submitted that that infringement is manifest.

The judgment of the Seventh Circuit Court of Appeals should be affirmed.

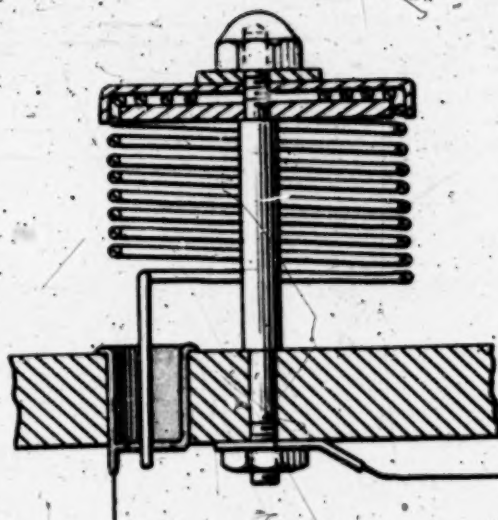
Respectfully submitted,

CASPER W. OOMS,  
*Attorney for Respondent.*

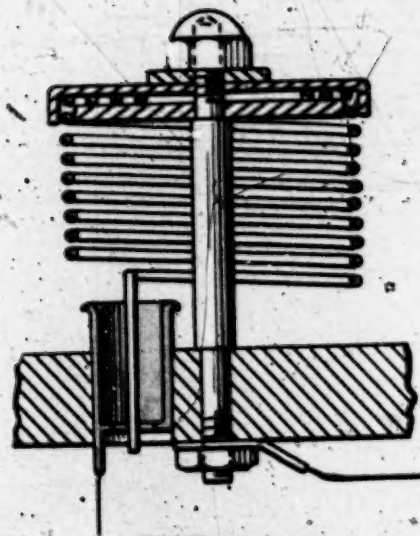
JOHN A. RUSSELL,  
*Of Counsel.*

January 2, 1942.

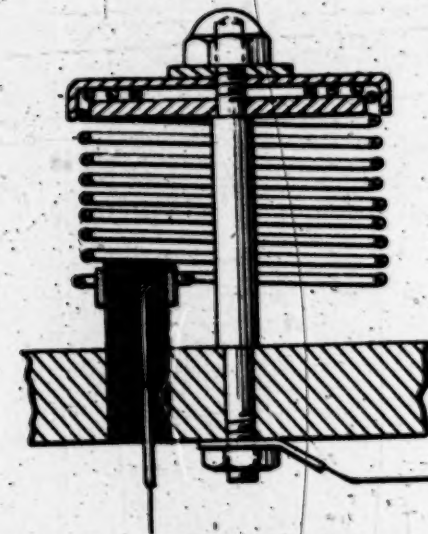




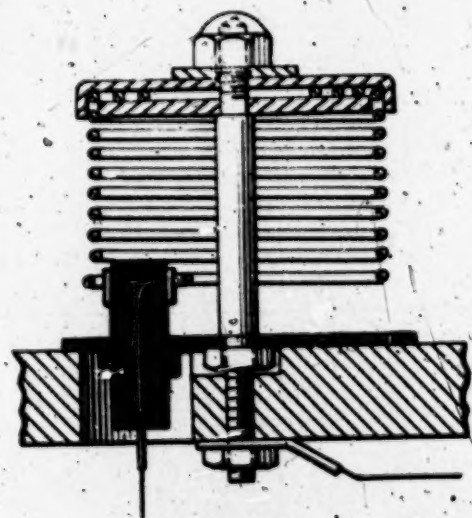
**FIG. 1**  
**THE NELSON DRAWING**



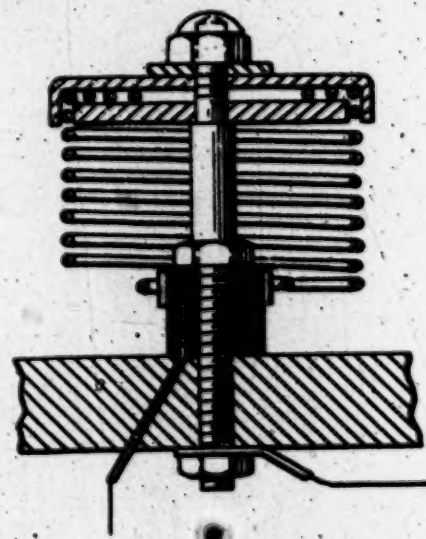
**FIG. 2**  
**THE NELSON STRUCTURE WITH**  
**CONDUCTOR RAISED AND MOVED**  
**INWARDLY**



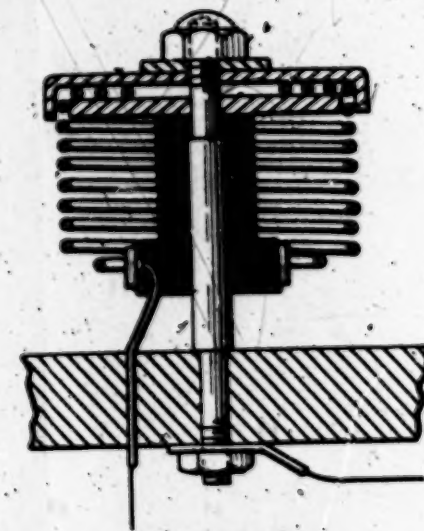
**FIG. 3**  
**INTRODUCING THE PASSIVE**  
**ELEMENT EMBEDDED IN THE**  
**TABLE**



**FIG. 4**  
**INTRODUCING THE LAMINATED**  
**TABLE WITH THE CONDUCTOR**  
**EMBEDDED THEREIN**



**FIG. 5**  
**ANCHORING THE PASSIVE ELEMENT TO**  
**THE STANDARD EMBEDDED IN THE TABLE**



**FIG. 6**  
**INVERTING THE ANCHORED**  
**PASSIVE ELEMENT**